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19 February 1993

Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

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Sir:

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Subject: ET Docket No. 93-1; FCC 93-1, 47 CFR Parts 2 and 15, Radio Scanners That Receive Cellular Telephone Transmissions, Comment on Proposed Rule Published in the Federal Register, Vol 58, No. 20 dated February 2, 1993.

The proposed rule requires comment both on operational and philosophical grounds. First, the philosophical. I realize that you have no alternative but to promulgate the regulations pursuant to Section 403 of P.L. 102-556, which appears to have been tacked on to the popular and well-intended basic bill as a special-interest service to provide the cellular telephone industry with a pretense to claim that analog cellular conversations are "private", thereby correcting at public expense a mistake that they made by not going to digital signal processing earlier. Unfortunately, for ordinary citizens who desire that laws affecting civil liberties and effectiveness of government reflect at least in part the laws of physics and basic principles of communications theory, there was little or no time to try to influence the legislation. As there now is no other forum in which to object save the courts, I will have to state my opposition to Section 403 here in the hope that the error might be corrected in the future.

For several compelling reasons, Section 403 and the pursuant regulation cannot and will not prevent monitoring of analog cellular emissions by the criminally motivated, the morbidly fascinated, or even the casually curious. Point: unencrypted analog radio frequency emissions are not inherently secure and can offer no reasonable presumption of privacy. If the cellular industry publicly claims otherwise, there are strong grounds for a legal finding of false advertising, Section 403 notwithstanding. Point: there are many cellular-capable analog scanners already in service, and they will remain capable of monitoring cellular calls until the cellular service moves to digital operation. The existing scanner pool probably will be maintained rigorously, given that the proposed ban should increase the net underground market value for the units. Point: converters are easily built from widely-available plans and commonly available discrete components, or kits. Point: UHF-equipped television sets can be used to listen in on cellular calls. Point: even cellular equipment itself can be pressed into such service. Final point: no effort should be wasted trying to accomplish by regulation what is physically impossible and what the cellular industry can and should do on its own: see below.

The d-a conversion prohibition in Section 403 and the pursuant regulation is somewhat easier to understand, because the digital sampling process basically is a form of encryption and therefore inherently conveys some reasonable expectation of privacy. Nonetheless, the section/regulation is ultimately meaningless as written because persons with sufficient motivation can use cellular equipment itself to circumvent the intent of the law, unless conversations are scrambled with specific encryption algorithms. Moreover, any receiver, scanner or not, that has audio output can be used as a source for signal processing by easily-built digital demodulators controlled by ordinary personal computing equipment, so signals processed with industry-standard sampling techniques cannot be regarded as secure without further encryption.

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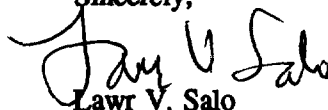
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Section 403 thus burdens manufacturers of scanning equipment with designing holes in frequency coverage, driving up costs of equipment, with little apparent effect. Where is the cost/benefit analysis? There is little easily available information to support the need for the regulation, aside from the infamous flap in Virginia involving the current governor of that commonwealth. Who actually has suffered in the current regulatory environment, and what are their real losses? What are the social costs of seizing the former liberty of American citizens to hear speech on the airwaves? What is the judicial burden of enforcing ECPA as it was before Section 403? Has ECPA been any more effective in securing the rights of citizens to privacy than the 1934 statute? What convictions have been obtained for criminal violations of airwave "privacy"? Have the courts had any difficulty in convicting the criminally-intended interceptors of privileged communications over the air? Why has the Government and the taxpayer been saddled with this responsibility to serve the narrow interest of one small industry, when the industry itself can and should solve the problem? The legislative history is not extensive on the matter; no Senate or House Report was even submitted with the final legislation.

Now, to operational considerations. With regard to section 15.121 of the proposed regulation, "scanning receiver" is so poorly defined that the scanning receiver part of cellular equipment itself may be considered as such. In the same section, defining "easily modified" is going to be a legally tortuous and practically impossible task, given the swiftly increasing electronic sophistication among the populace, to say nothing of those who are strongly motivated by either curiosity or larcenous intent. As discussed above, any scanning receiver can be equipped with digital decoders through a simple audio connection, so the provision as written in effect bans manufacture of all scanners, which (one hopes) the law did not intend. You have before you a difficult and almost certainly pointless task--better to revisit the law itself and repeal the unnecessary and unenforceable provisions of Section 403.

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Sincerely,



Jay V. Salo